Case No. 22-70118

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR FOOD SAFETY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents,

and

SYNGENTA CROP PROTECTION, LLC,
Respondent-Intervenor.

On Petition for Review of an Order of the
United States Environmental Protection Agency

PETITIONER'S OPPOSITION TO VOLUNTARY REMAND AND REPLY IN SUPPORT OF SUMMARY VACATUR

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INTRODUCTION

Respondents now agree with Petitioner about the unlawfulness of their action here: namely that Respondents violated the Endangered Species Act (ESA) when they failed to consult before issuing the difenoconazole interim registration. Respondents concede that, just six months ago, this Court unequivocally held that the Environmental Protection Agency (EPA) must complete ESA consultation on interim registration review decisions before it issues them. EPA Mot. 10-11, ECF 19-1 (citing *Nat. Res. Def. Council, Inc. v. EPA*, 38 F.4th 34, 59 (9th Cir. 2022)). And Respondents' admitted EPA violation aside, Respondents also now agree with Petitioner about the missing metabolite studies' importance in adequately evaluating difenoconazole's human health impacts under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). EPA Mot. 10; Pet. Mot. 18-23, ECF 16-1.

As EPA has repeatedly done in challenges to its pesticide registration actions, EPA has once again laid down its sword, it will not defend. *See infra* pp. 12-14. But once again, EPA asks this Court for a do-over to fix its clear errors while evading judicial review. This Motion

for Voluntary Remand comes on the heels of repeated EPA requests for voluntary remand upon realizing it cannot defend its erroneous FIFRA and ESA conclusions for pesticide registrations. These ongoing requests not only deprive litigants like Petitioner of their day in court, but also subject them (and the broader public) to unlawful and inadequate agency actions causing serious and even irreversible environmental harm.

To be sure, in this particular case, EPA's belated remand request is more of a victory for Petitioner than open-ended voluntary remand without vacatur, because EPA says it will withdraw the registration decision after remand. As such, that route would provide much of the relief sought by Petitioner: whether through court ordered summary vacatur, or remand and withdrawal, the interim registration is revoked, nullified, and the harm to endangered species and potential threat to human health removed.

But the remand requested here is still up to this Court's discretion, and this Court should deny it. It is undisputed that EPA committed clear error in violating the ESA's core consultation provisions and that EPA also committed clear legal error in failing to

obtain critical metabolite studies, mandated by FIFRA, and which the agency itself found mandatory nearly two decades ago. And clear error is the standard warranting summary vacatur. The Court has everything it needs before it to grant summary vacatur and Respondents and Intervenors have zero practical grounds (or even standing) on which to object, as EPA itself has said it is going to do the same thing by withdrawing the registration decision.

Furthermore, EPA and Intervenors' legal arguments in favor of voluntary remand without vacatur hold no weight. First, this Court's decision in *Natural Resources Defense Council* does not serve as a cognizable "intervening event" for purposes of remand because it changed nothing: *decades* of case law establish ESA consultation as a mandatory requirement for agency actions. Second, relatedly, nothing in EPA's Motion instills confidence that the agency will change its positions on remand during difenoconazole's future registration review; to the contrary, EPA only requests remand to "consider" whether the glyphosate decision "controls the analysis of the ESA claims here," EPA Mot. 11, and to "investigat[e]" whether it needs the metabolite studies. EPA Mot. 10. No action is promised. And finally, EPA promises only to

reconsider in a *separate* agency action, the final registration decision, which it cannot use to support remand for the interim registration at issue here.

Finally, in the alternative, should this Court nonetheless grant EPA's Motion for Voluntary Remand, this Court should order that the interim registration is vacated if EPA does not comply with the 30-day deadline it suggested to withdraw, as a necessary incentive in light of EPA's egregious and repeated delay. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (ordering final rule and vacating the rules unless agency complied with the court's).

ARGUMENT

I. Respondents' "Intervening Events" Are Not Cognizable to Justify Its Remand Request.

EPA's repeated attempts to try and avoid judicial review through voluntary remand are far from a given. Rather the question is fundamentally left to this Court's discretion. *Limnia, Inc. v. United States Dep't of Energy*, 857 F.3d 379, 381 (D.C. Cir. 2017) (courts have "broad discretion to decide whether and when to grant an agency's request for voluntary remand"). Especially where the agency does not confess error and makes no commitment to change its approach, the

Court may deny a "novel, last second motion to remand." *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 349 (D.C. Cir. 1998). While there may be *some* situations where remand is appropriate "because of intervening events outside of the agency's control," that is not this case. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001).

First, as to its rationale on ESA consultation, EPA relies entirely on *Natural Resources Defense Council*. *See* EPA Mot. 10-11. But this Court's decision in *Natural Resources Defense Council* is not a cognizable intervening event, as EPA's plain duty to complete ESA Section 7 consultation existed well before this Court's recent decision. The *Natural Resources Defense Council* decision did no more than assess particular facts and confirm EPA's longstanding duty "to comply with the ESA by making an effects determination before issuing [a] decision" in an affirmative, discretionary action like the difenoconazole interim registration. *Nat. Res. Def. Council*, 38 F.4th at 59; *cf. Nat'l Fuel Gas Supply Corp. v. Fed. Energy Reg. Comm'n*, 899 F.2d 1244, 1247-50 (D.C. Cir. 1990) (remanding for the agency to address a judicial

opinion invaliding the administrative order that formed the basis for the agency decision under review).

EPA claims it did not know prior to *Natural Resources Defense Council* that interim registration decisions constitute agency actions, subject to ESA consultation. EPA Mot. 10 n.2. But even if it were ignorant of this mandatory duty, its claimed ignorance of the law is not an excuse. And this ignorance does seem unlikely: this Court, and others, have repeatedly ruled against EPA's attempts to skirt ESA compliance in FIFRA decisions for the last three decades. *E.g.*, *Farmworker Ass'n of Fla. v. EPA*, No. 21-1079, 2021 U.S. App. LEXIS 16882 (D.C. Cir. June 7, 2021); *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1029 (9th Cir. 2005) (failure to consult for fifty-four pesticides); *Ellis v. Housenger*, 252 F. Supp. 3d 800, 820 (N.D. Cal. 2017) (failure to consult for dozens of pollinator-harming pesticides); *Lane Cty. Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992) (interim management strategy designed to be implemented immediately constitutes agency action triggering consultation); *Defs. of Wildlife v. Adm'r, EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989) (strychnine

registration violated ESA).[1] Just because *Natural Resources Defense Council* put a "gloss" on this existing statutory obligation does not mean that it changed the law. *Am. Forest Res. Council v. EPA*, 946 F. Supp. 2d 1, 42 n.5 (D.D.C. 2013) (refusing to find change in case law as reason for EPA's legal violation and treating the agency's requested remand "as one based on the agency's recognition of its own error, influenced as it were by several judicial decisions" and accordingly finding that remand was "discretionary rather than mandatory.")

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[1] *See also Nat. Res. Def. Council,* 38 F.4th at 59; *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 188 (D.C. Cir. 2017); *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1093 (9th Cir. 2017); *Wash. Toxics Coal. v. EPA*, No. C01-132C, 2002 U.S. Dist. LEXIS 27654, at *50-51 (W.D. Wash. July 2, 2002); Stipulated Inj. & Order, *Ctr. for Biological Diversity v. Johnson*, No. 02-cv-1580 (N.D. Cal. Oct. 20, 2006), ECF 242; Order Approving Stipulated Inj. & Settlement, *Ctr. for Biological Diversity v. EPA*, No. 07-cv-02794, at 1, 3-7 (N.D. Cal. Jan. 12, 2010), ECF 121; Order Approving Stipulated Notice of Dismissal, *Ellis v. Keigwin*, No. 13-cv-01266 (N.D. Cal. May 29, 2019), ECF 371; Proposed Stipulated Partial Settlement Agreement and Order Entering Stipulated Partial Settlement Agreement, *Ctr. for Biological Diversity v. EPA*, No. 11-cv-00293 (N.D. Cal. Oct. 2019), ECF 364, 366; Order Granting Mot. to Approve Stipulated Partial Settlement, *Nat. Res. Def. Council v. Wheeler*, No. 1:17-CV-02034-TSC (D.D.C. Jan. 28, 2021), ECF 55.

II. EPA Has No Answer for Its Missing FIFRA Analysis.

Second, regarding its FIFRA violations, EPA seeks voluntary remand to "reconsider its previous position" and complete "a more thorough investigation." EPA Mot. 9-10. Here too, the Court should deny the remand request, as EPA does not even attempt to contradict Petitioner's assertion that it committed clear error in failing to follow up on the year 2000 data call in, warranting summary vacatur. Instead, EPA attempts to cast doubt on whether the formal data call in for the mandatory studies actually occurred, despite repeated mentions in its 2006 Triazole Risk Assessment. EPA Mot. 8-10; *see* Pet'tr Mot. 6-7.

These clarifications do nothing to hide EPA's clear error. Critically, the 2006 Triazole Risk Assessment plainly identifies some of the studies referenced in Petitioner's Motion as *included* in EPA's 2000 data call in. *See* Attach. 3 at 5, ECF 16-2 ("In 2000, the Agency delayed granting registration of any new triazole pesticides or new uses of already registered triazole pesticides … and issued data call ins for a number of studies."); *id* at 6 (stating EPA included chronic toxicity/oncogenicity study in male rats and female mice *in the 2000 data call in* but did not receive the studies); *id.* (same for the

neurotoxicity study in rats). And EPA even admits that a 2002 EPA letter to the U.S. Triazole Task Force plainly identified the need for "additional information before an assessment analyzing the potential risks associated with exposure to 1,2,4-triazole [a metabolite of difenoconazole] and its conjugates could be conducted." Goodis Decl. ¶ 19, ECF 19-3.

Furthermore, formal or not, the 2006 Triazole Risk Assessment unequivocally recommended that EPA collect all missing metabolite studies referenced by Petitioner before registering any additional triazole fungicides. Attach. 3 at 6. The bottom line is EPA does not deny it failed to collect these studies it found necessary twenty years ago and, as a result, failed to support its interim registration with substantial evidence.

III. The Court Should Not Reward EPA's Shell Game.

Third, neither of EPA's requests for voluntary remand on the ESA and FIFRA issues identify any specific shortcomings that it wishes to correct. Rather, the agency merely suggests it will "*consider*" the *Natural Resources Defense Council* decision, EPA Mot. 11 (emphasis added), and "*investigat[e]*" the need for the metabolite studies. *Id.* at 10

(emphasis added). EPA *has not even committed to completing ESA Section 7 consultation*: Despite having more than four months to digest *Natural Resources Defense Council*, EPA claims it still needs to "consider" whether the glyphosate decision "controls the analysis of the ESA claims here." EPA Mot. 11. And despite two decades of "investigation" regarding the metabolite studies, EPA claims it needs a voluntary remand to continue this investigation. *Id.* at 10. EPA's failure to specify its course of action on remand, following two decades of inaction on these metabolite studies, weighs heavily against its requested remand.

Finally, EPA claims it will "reconsider" these issues in the final registration, but that has nothing to do with the challenged action, which is an interim registration. EPA Mot. 11-12. Long established case law does not allow agencies to reconsider their actions in *separate* agency actions on remand. *Limnia, Inc.*, 857 F. 3d at 386. Remand requests "may be granted only when the agency intends to take further action with respect to the *original agency decision on review*." *Id.* (emphasis in original). "Otherwise, a remand may instead function . . . as a dismissal of a party's claims." *Id.* The final registration, whenever

EPA issues it, is a separate agency action. It cannot be used to support remand for the interim decision at issue here. EPA needs enforceable judicial guidance in order to produce a legally sound registration decision, and this Court should deny remand and provide it.

IV. EPA's Request Evinces Bad Faith and Will Prejudice Petitioner by Unduly Delaying Registration Review.

Even if the Court were to give credence to EPA's stated rationale, it still can and should deny EPA's Motion and instead grant Petitioner's Motion, because courts' "broad discretion" to deny agency remand requests, *id.* at 381, includes denying remand if "remand would unduly prejudice the non-moving party," *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018), judgment entered, No. 15-1219, 2018 WL 4158384 (D.C. Cir. Aug. 21, 2018), or if it is "frivolous or made in bad faith." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012); *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004) ("To be sure, an agency's reconsideration of its own decision may in some contexts be unwarranted, or even abusive.").

First, EPA's Motion for a mulligan landed at the very last possible moment: the same day its Response to Petitioner's Motion for Summary

Vacatur was due, *see* Order, ECF 17, nearly four and a half months after this case was docketed and four months from when this Court issued its decision in *Natural Resources Defense Council*. And on the FIFRA side, EPA's decision to further investigate the missing metabolite studies comes nearly *two decades* after EPA initially found them necessary. The reason for EPA's Motion is plain: this is nothing more than an attempt to avoid judicial review on claims the agency is sure it will lose if adjudicated now.

EPA has done this before in other pesticide action challenges; in fact the agency has done this repeatedly.[2] These voluntary remands have not worked to shift EPA's behavior into compliance with the ESA,

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[2] *See, e.g.*, Mot. for Partial Remand Without Vacatur, *Nat. Res. Def. Council v. EPA*, Nos. 20-70787, 20-70801 (9th Cir. May 18, 2021), ECF 82-1; Mot. Stay, *Ctr. for Food Safety v. EPA*, No. 21-71180 (9th Cir. Feb. 23, 2022), ECF 30-1 (responding to BASF's request to voluntarily cancel registrations of trifludimoxazin after petitioners sued over failure to consult); Mot. for Voluntary Remand Without Vacatur, *Ctr. for Food Safety v. EPA*, Nos. 19-72109 & 19-72280 (9th Cir. Oct. 26, 2020), ECF 51; Order, *id.* (9th Cir. Jan. 12, 2021), ECF 67 (denying Mot. for Remand Without Vacatur); *Farmworker Ass'n of Fla.*, 2021 U.S. App. LEXIS 16882 (D.C. Cir. June 7, 2021) (denying Mot. for Voluntary Remand Without Vacatur and vacating aldicarb); Cross-Mot. for Voluntary Remand, *Nat. Resources Def. Council v. Regan*, No. 17-CV-02034, (D.D.C June 11, 2021), ECF 59, 59-1 (neonicotinoid pesticides); Mot. for Remand Without Vacatur, *Ctr. for Biological Diversity v. EPA*, 20-73146 (9th Cir. Sept. 10, 2021), ECF 39-1.

and likely will not do so now. Instead of listening to courts' *repeated* instructions to consult prior to acting under FIFRA, *see supra* n.1, these remands have encouraged EPA's current "wait and see" approach. This involves the agency 1) failing to conduct ESA consultation on FIFRA actions, 2) waiting for a lawsuit, 3) admitting to violations, then 4) avoiding judicial review by asking the courts to remand without vacatur or any enforceable deadline.

The Court should not let EPA escape facing the music again; this is not proper grounds for a remand without vacatur. Rather it is another textbook example of extreme tardiness evincing bad faith. *N. Coast Rivers All. v. U.S. Dep't of Interior*, 2016 WL 8673038, at *3 (E.D. Cal. Dec. 15, 2016) ("bad faith may be demonstrated when an agency's position does not demonstrate a commitment to a changed approach."); *see also Lutheran Church-Missouri Synod*, 141 F.3d at 348-49 (finding bad faith where agency was employing "novel" tactics to avoid judicial review.). At the time of the decision, EPA had the tools to complete the EPA and FIFRA mandated analyses and knew of the analyses these statutes require, *but chose not to act.* Instead, EPA chose to, after twenty years, "continue to evaluate the need for additional data,"

Attach. 1 at 9, on the triazole metabolites it stated should be required as "a condition of registration" nearly twenty years ago, Attach. 3 at 5-6, and complete its ESA assessment and consultation at an unspecified date. *Id.* at 3. Even now, EPA wishes to "reconsider" and "investigate" but, again, with *no commitment to making meaningful changes* to its decision. Instead, as EPA has stated it is simply going to withdraw the entire action, like Lucy moving the football from Charlie Brown.

Second, when faced with a request to remand without vacatur, a court should "weigh[ ] the equities of remanding without vacatur against those of deciding the merits and possibly vacating the challenged [decision]." *E.g., Am. Forest Res. Council,* 946 F. Supp. 2d at 42-43. Just as in the recently denied sulfoxaflor voluntary remand motion, *Center for Food Safety v. Wheeler*, Nos. 19-72109 & 19-72280 (Jan. 12, 2021), ECF 67, the equities here weigh in favor of denying remand without vacatur. *See infra* pp. 12-17.

Petitioner filed this challenge to obtain judicial review of the interim registration, which is actively causing harm while it is left in place. Granting remand on all of Petitioner's claims will deprive Petitioner of judicial review of those claims and allow EPA to continue

delaying this important process. (EPA has given no timeline on when it will issue the remainder of the interim registration, whether it will prepare a new draft interim decision and a final decision.) Without guidance from the Court on the challenged decision, EPA could fail to withdraw and/or apply faulty analysis in its further interim and/or final decisions. Remand would prejudice Petitioner, while insulating EPA from a judgment that would guide its future assessments and registration decision on difenoconazole. *See Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414, 436, 438 (D.C. Cir. 2018) (denying remand on issues that would prejudice environmental petitioners and granting remand only for issues for which its opinion would be "wholly advisory; it would resolve no controversy and would award no relief.").

And finally, remand without addressing Petitioner's Motion is not proper here because EPA claims (falsely) that it can complete the required analyses in a completely *different* agency action, the final registration.[3] EPA Mot. 11-12. This is not the law, as explained *supra.*

[3] FIFRA requires it for numerous pesticides by that date, *see* 7 U.S.C. § 136a(g)(1)(A)(iii)(I), but given the belated nature of the remainder of EPA's difenoconazole process (and general registration review

Rather, remand requests are to be granted only when the agency will take further action in the same agency decision under review. *Limnia, Inc.*, 857 F.3d at 386. EPA attempts to distort the law in a way that could result in an endless cycle of deference to the agency, all the while evading judicial review. *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000) (denying voluntary remand for EPA rule where EPA made no offer to vacate the rule because "EPA's proposal would have left petitioners subject to a rule they claimed was invalid.").

V. Vacatur Is Proper Here.

Intervenors, on their part, argue that Petitioner has not met the standard for summary vacatur. Intervenors' Resp. 10-15, ECF 20. As a threshold matter, withdrawal through summary vacatur or following

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processes), it defies good faith belief to conclude this could take years. In the case of glyphosate, EPA recently withdrew its interim decision because it could not meet the deadline of October 1, 2022, stating that consultation and a revised ecological risk assessment would take until 2026. EPA Pet., *Nat. Res. Defense Council v. EPA*, No. 20-70787 (9th Cir. filed Aug. 1, 2022), ECF 141-1. And even worse than glyphosate, here, EPA has not even begun its consultation. Goodis Decl. ¶ 25, ECF 19-3. Thus, if EPA actually complies with the ESA for the final registration (unlike for many others), this is also likely to push the final registration even further down the line. *See also* Decl. ¶ 26 (estimating that consultation and a revised ecological risk assessment will take "several years").

remand affect Intervenors' property interest in its difenoconazole products exactly the same, calling into question Intervenors' standing to even pursue this claim. This Court granted intervention as of right based on Intervenors' interest in maintaining the ability to sell and distribute difenoconazole products, and concerns about alteration of the terms under which Intervenors can sell them, neither of which any longer are at stake here. *See* Mot. Intervene, ECF 9; Order, ECF 15.

But even if Intervenors do have standing, their arguments against summary vacatur have no merit. Intervenors go so far as to argue that the decision in *Natural Resources Defense Council* weighs against vacatur in this scenario. But there, the Court made plain that vacatur *does* serve as the proper remedy for failure to consult on an interim registration, explaining it only refrained from vacating the ecological risk assessment for "practical reasons" not present here. *Nat. Res. Defense Council*, 38 F.4th at 61. The Court even made it a point to explain it hesitated not to vacate so as to not "reward what some might consider sloth or indolence," but declined partial vacatur *only* because vacating could have further delayed ESA consultation beyond the congressionally mandated October 1, 2022 deadline in that scenario. *Id.*

The Court should not reward it here. And to be sure, there, the Court *did* vacate the interim registration in part on FIFRA grounds. *Nat. Res. Defense Council*, 38 F.4th at 52.

Intervenors fare no better in their additional attempts to prevent vacatur. First, regarding Petitioner's FIFRA claim, Intervenors argue that this Court cannot find "clear error" because it has not reviewed a full record. But this argument misses the point: the record *does not contain* the metabolite studies. EPA already reviewed studies pertaining to triazole metabolites two decades ago and determined that it needed additional studies yet finalized its human health risk assessment without them. As a result, "extensive review of the record" would do nothing to resolve this claim.

Furthermore, Intervenors' argument proves too much: requiring review of the record negates the entire purpose of the summary vacatur motion. *See* 9th Cir. R. 3-6. Intervenors' same arguments were made by Amici in *Farmworker Association of Florida* and rejected by the D.C. Circuit. *Farmworker Ass'n of Fla.*, 2021 U.S. App. LEXIS 16882 (D.C. Cir. June 7, 2021). There, Amici similarly argued that the court needed to complete record review in order to determine the seriousness of

EPA's error in failing to consult, considering EPA conducted other ecological risk assessments on aldicarb. CropLife Amicus Brief, *Farmworker Ass'n of Fla.*, 2021 U.S. App. LEXIS 16882, at 4-5 (D.C. Cir. filed April 21, 2021); ECF 1895471. The Court did not even reference this argument in its Order, instead focusing on EPA's failure to consult under the ESA. Similarly, EPA's failure to obtain documents should not require record review here.

In contrast, the only cases Intervenors cited required far more record-intensive questions than whether EPA consulted under the ESA or obtained the studies it identified as necessary. For example, N*ational Family Farm Coalition v. EPA* undoubtedly required this Court to review a multitude of studies, EPA's cost-benefit analysis, and other evidence in the record to determine if substantial evidence supported EPA's conclusions as to the environmental and socioeconomic harms of the 2016 dicamba registrations. Pet'rs Opening Brief (Redacted), at 13–14, *Nat'l Family Farm Coal. v. EPA*, 747 F. App'x 646 (9th Cir. Feb. 9, 2018), ECF 17-70196. And the other case Intervenors cite, *Hooton*, supports Petitioner here. There, as here, the Ninth Circuit granted the Government's motion for summary vacatur because it only needed to

complete a brief review of 1) the appellant's brief, 2) the applicable law, and 3) the district court record. *United States v. Hooton*, 693 F.2d 857, 859 (9th Cir. 1982). Similarly, a brief review here of 1) Petitioner's brief and the attached 2006 Memorandum, 2) the applicable law, and 3) the interim registration provide all the record this Court needs.

And EPA's suggestion that it may no longer need some of the studies required in 2006 has no bearing on this case. This is a separate issue, as Petitioner does not challenge a future EPA decision that it no longer requires the studies. Rather, Petitioner challenges the interim registration, which failed to incorporate the studies EPA unequivocally requested in its 2006 Memorandum but admittedly failed to obtain. If EPA, in the future, were to decide it no longer requires these studies, such a decision would require extensive review of the record. That is not this case.

Third, Intervenors' attempt to distinguish *Farmworker Association of Florida v. EPA* from this scenario fails as well. There, as here, the Court denied EPA's motion for voluntary remand and granted summary vacatur due to EPA's failure to consult under the ESA before taking action. *Farmworker Ass'n of Fla.*, 2021 U.S. App. LEXIS 16882

(D.C. Cir. June 7, 2021) (denying motion for remand without vacatur and vacating aldicarb). In fact, courts have *repeatedly* denied voluntary remands without vacatur when EPA fails to complete ESA consultation prior to taking action under FIFRA. *See, e.g.*, Mot. for Voluntary Remand Without Vacatur, *Ctr. for Food Safety v. EPA*, Nos. 19-72109 & 19-72280 (9th Cir. Oct. 26, 2020), ECF 51; Order, *id.*, (9th Cir. Jan. 12, 2021), ECF 67 (denying motion for remand without vacatur); Cross-Motion for Voluntary Remand, *Nat. Resources Def. Council v. Regan*, No. 17-CV-02034 (D.D.C June 11, 2021), ECF 59, 59-1 (neonicotinoid pesticides); Mot. for Remand without Vacatur and Resp., *Ctr. for Biological Diversity v. EPA*, No. 20-73146 (9th Cir. Sept. 10, 2021), ECF 39-1. The Court should do so again here.

VI. In the Alternative, the Court Should Maintain Jurisdiction and Impose a Deadline on Withdrawal.

Alternatively, this Court should grant EPA's Motion but order that the interim registration is vacated if EPA does not comply with its suggested 30-day deadline to withdraw, as a necessary incentive in light of EPA's egregious and repeated delay. *Core Communications*, 531 F.3d at 862 (ordering final rule and vacating the rules unless agency complied with the court's). EPA's intention to withdraw the interim

registration fails to provide an enforceable deadline, risking ongoing harm to Petitioner and its members.

Courts may, and often do, retain jurisdiction during remand and impose deadlines for agencies. *See, e.g.*, *In re Ctr. for Biological Diversity*, 53 F.4th 665, 673 (D.C. Cir. 2022) (retaining jurisdiction to monitor EPA's progress in completing a mandatory effects determination for cyantraniliprole under the ESA); *Util. Solid Waste Activities Grp.*, 901 F.3d at 436 (granting remand on claims where EPA submitted a timeline for reconsideration); *All. for the Wild Rockies v. Allen*, 2009 WL 2015407 (D. Or. July 1, 2009) (calling the motion for partial remand a "close call" and ordering defendants to submit a final rule on a schedule); *Sea Shepherd New Zealand v. United States*, 469 F. Supp. 3d 1330, 1337 (Ct. Intl. Trade 2020) (granting voluntary remand in light of new laws and ordering reconsideration in two months); *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 137 (D.D.C. 2010) (remand deadline and status reports); *S. Cal. Edison Co. v. Fed. Energy Reg. Comm'n*, 2004 WL 326225, at *1 (D.C. Cir. 2004) (requiring agency to file status reports every 30 days). Particularly given that EPA has already had six months to consider the *Natural Resources Defense*

Council decision, and nearly twenty years to investigate the studies, withdrawal should not take the agency long, and this Court should set a commensurate tight withdrawal timeframe.

CONCLUSION

Under the existing caselaw the remand requested here is up to this Court's discretion. And pursuant to it, for the reasons stated above, the Court should deny it and put an end to EPA's repeated attempts to evade judicial review.

At the end of the day, Petitioner has met the legal standard for summary vacatur, and EPA has conceded. But more broadly, the doctrine of voluntary remand that EPA has made a pattern and practice of using in pesticide cases, as exemplified here, is simply an antiquated holdover from a bygone time of administrative law,[4] an idea at odds with basic principles of judicial review, like finality and efficiency. Indeed, such a doctrine in any other legal context could not remain —

[4] Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 ADMIN. L. REV. 361, 363 (2018) (explaining that the doctrine "no longer reflects the legal relationship between agencies and courts" and is "based on a set of inaccurate assumptions about why agencies might seek voluntary remands, and what the effects of those remands would be").

for example, in contract law, granting defendants permission to go back and tinker with a contract after plaintiffs present their affirmative case, granting defendants the benefit of that foresight.[5] Rather, in any other context, the defendant would have to either admit liability and take the remedial punishment or continue to defend the conduct. It should be no different here.

For the reasons stated above, the Court should deny EPA's Motion and grant Petitioner's Motion for Summary Vacatur. In the alternative, this Court should order that the interim registration is vacated if EPA does not comply with the 30-day deadline to withdraw.

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[5] E.g., Revesz, *supra* n.4 at 367 ("As a remedy, the voluntary remand is unique in American law. No other motion allows a defendant to rid itself of a lawsuit without refuting its opponent's legal contentions (as in a motion to dismiss) or without the opposing party's consent (as in a settlement)."); Hickman & Nielson, *Foreword, Fifty-First Annual Administrative Law Symposium: The Future of Chevron Deference*, 70 DUKE L.J. 1015 (2021) (discussing the "anti-administrativist" trend of recent years and commenting that "[i]ndeed, if the law is nothing more than prediction, then perhaps *Chevron* has already been overruled").

Respectfully submitted on December 16, 2022.

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Counsel for Petitioner

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I HEREBY CERTIFY that this Response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 4,953 words, according to the count of Microsoft Word. I further certify that this Response complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in Microsoft Word using 14-point Century Schoolbook, a proportionally spaced font.

/s/ Meredith Stevenson
Meredith Stevenson

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to attorneys of record, who are required to have registered with the Court's CM/ECF system.

/s/ Meredith Stevenson
Meredith Stevenson

Counsel for Petitioner